Legal Status of Juridical Persons with Not-For-Profit Purpose

Senior Lecturer Anca POPESCU-CRUCERU, PhD
ancacruuceru@yahoo.com
Artifex University of Bucharest
Faculty of Management-Marketing

Assistant Eugenia-Gabriela LEUCIUC, PhD Student
gabrielar@seap.usv.ro
Stefan cel Mare University of Suceava
Faculty of Economic and Public Administration

Viorel BĂNULESCU, PhD Student
viorel_banulescu@yahoo.co.uk
Bucharest Academy of Economic Studies
The Doctoral School

Abstract
The present research represents a brief ingression within the legal framework of associations and foundations, in Romanian and compared law, related to specific legal stipulations and their practical consequences. The authors’ intention is that of outlining certain deficiencies of the law in force, pointed out especially by the legal practice, suggesting that legal dispositions should be completed, aiming to set certain concrete rules to apply in order to eliminate certain possible subjective interpretations.

Key words: association, foundation, legal personality, not-for-profit purposes, general interest, private interest

JEL Classification: K22, L31, L33

Introduction
As part of the category of private legal persons, associations and foundations are entities with legal personality and not-for-profit purpose, constituted of natural and legal persons all conducting activities of general or communitarian interest. The sense of the definition of such legal matters has remained unaltered since 1924, when, right in the middle of the Romanian legal system development, was drafted and issued the so-called “Law Mârzescu”, after the name of the minister of justice back in those times, more precisely Law no. 21/1924 of foundations and associations. Subsisting, with small alterations, almost seven centuries, this law was replaced in 2000 by the Emergency Ordinance no. 26/30 of January 2000, normative act which was altered and completed in 2003, by means of the Emergency Ordinance no. 37/2003. In essence, such legal instruments are based on the principle of free association, confirmed by art. 37 of the Romanian Constitution, applied in what concerns the promotion of civic values, in the accomplishment of a general, moral and abstract interest, or of a local or common goal.

Legal status of legal persons with not-for-property purpose
According to the definition given by art. 1 of the EOG no. 26/2000, altered by the EOG no. 37/2003, are not considered associations or foundations all political parties,
unions and religious cults, explaining, in the same time, the notions of "general interest" and "common goal ", which raised enough problems to legal courts, while interpreting their sense.

Thus, by "activities of general interest", the law does not have in view the activities conducted in the area of economical, social and cultural development, the promotion and defense of human rights, the promotion of health, education, science of arts, traditions, cultures, support of religion and human values, the maintenance of social wealth, and the support of public works and infrastructure. By exclusive legal determination of the domains representing a purpose for the associations and especially the foundations, it can be stated that it is practically applied the possibility, given by law, for these entities to develop commercial activities, which financial results, but they must be reflected within the association or the foundation. In what concerns the definition of “communitarian interest”, the EOG no. 37/2003, shows that this represents any interest belonging to a community (neighborhood, town or local-administrative unit), or to a group of natural and/or juridical persons, all following a common goal or the same opinions, culture or religious, social or professional orientation, yet the list is not limited.

These entities can group in federations, which legal regime is regulated in chapter V of the EOG no. 26/2000, provisions offering self-standing legal personality to these ones too, without affecting the legal personality or the private patrimony of their members.

All these three categories of subjects of civil law beneficiate, under the conditions of the law, of the possibility of access to private resources, as well as public, which possibility is offered to federations inclusively, after the entrance into force of the EOG no. 37/2003.

The constitution of foundations and associations is achieved on the grounds of a constitutive act and of a statute (of organization and function), signed and authenticated, under the penalty of absolute nullity.

The provisions of these documents are imperatively provided by law, the miss insertion of any of them between the mandatory mentions attracting the absolute nullity of the document.

In order to authenticate/certify the constitutive act and the statute, it is necessary to present the proof of the availability of the name of the legal person to be, issued, in conformity with the law, by the Ministry of Justice (it is stated the fact that the name of the legal persons, be it association, foundation, federation or subject of commercial law, shall not use words such as “national, Romanian”, or any other sentences specific to authorities or public institutions or any other liberal profession or self-regulatory activities).

Related tot this imperative demand of the law, there are certain aspects to point out.

According to the Ministry of Justice Order no. 954/B/C/26.04.2003, by means of which it is approved the Regulation for the organization of the Register of Associations and Foundations, Register of Federations, as well as the National Register of legal persons with not-for-profit purpose, the special authority within the Ministry of Justice, receiving a request of registration of the availability of an association/foundation, can reject the issue of the respective proof, when breached the legal provisions, as well as when there is an identity between the solicited name and one attributed already to a different registered legal person.

Additional to the regulation much too extended comprised in the mentioned legal instruments, we consider that there can intervene a certain subjectivism both of the administrative authority and of the court issuing this mandatory permit, as it is difficult to
appreciate whether it belongs to specific “liberal professions or to any other self-regulatory activities”.

For the exemplification, the medical activity can be considered liberal activity or profession, circumstances under which the name of “Doctors without borders” should be rejected; or, with more severe consequences, the constitution of the “Romanian Constitutional Bar”, existent name, passed with little difficulties, although such name, despite the confusions it can produce, attract consequences hard to repair, entering not only under the incidence of special civil laws, but also under criminal laws (the members of this institution developing the profession of lawyers outside the special organic law – therefore, the alleged mandate of such representative-lawyer being legally null).

From this point of view, probably in order to ensure a higher level of objectivity, the existent legal instruments should be completed by indicating with a greater precision the categories of names which can be used by the newly constituted associations/foundations.

The legal personality of the association, foundation or federation can be achieved by passing the legal control stage, concluded by the pronunciation of a hearing report disposing over the registration of the association/foundation in the registrar of legal persons. This report of admission or rejection of the registration request has the legal value of a court decision, as it is susceptible to be attacked with appeal within 5 days since the day of pronouncement, for the present parties and from the day of the communication, for the absent parties. The appeal is judged in the Advising Chamber, summoning the parties, in emergency procedure and preferentially.

The authority of resolution of the registration demands belongs to the local court of justice under which jurisdiction is the headquarter of the respective legal person, except for the registration of the foreign legal persons' representatives, with not-for-profit purpose, which is to be issued by the Bucharest Tribunal, on the grounds of the preliminary approval by the Romanian Government.

In this last case, the recognition procedure knows certain particularities compared to the common law procedure, in the sense of the preliminary mandatory transition of the administrative phase, by obtaining the approval of the Romanian Government for the registration on the territory of this country of a dismemberment of a foreign legal person, with special status.

Therefore, the sense of the law lacks clarity, art. 76 and the following from the EOG no. 26/2000 making a certain confusion in defining the institutions.

It is acknowledged the fact that, in a strictly legal sense, the notion of “legal entity recognition” does not coincide with the notion of “representative”, which acts, according to classic definitions, as a simple mandate/commissioner of a parent-company.

From the content of the legal text above it seems that, actually, the parent “legal person” is to act on one's behalf on the territory of Romania, especially since, corroborating with art. 76 and art. 81 of the law, it results that this is precisely the sense.

Law no. 105/1992 provided, in art. 165 and the following., that a court decision produces its effects on the Romanian territory through recognition; from this point of view, legal persons from most of the countries are submitted to legal control, and by this conferring legal personality.

It is also worth noticing the resemblance of regulation regarding the recognition procedure of foreign court decisions effects and the foreign entities' legal personality recognition – from this point of view, at least immediately after the entrance into force of the EOG no. 26/2000, governmental authorities and instances were put in a sort of embarrassment in matters of legal qualification for the registration demands of the alleged
“representatives” of foreign legal entities with not-for-profit purposes. Such fact was brought into discussion also by the financial authorities, knowing that the financial regime of the representatives is different from that of the Romanian legal persons.

Nowadays, foreign legal entities recognition is accomplished according to art. 2.582 of the New Civil Code, which effects are made legitimate by art. 2.583 NCC – thus, it benefits from all the rights arising out of its organic status law (domestic law), by conducting the activities on the Romanian territory under the circumstances established by the Romanian law according to their exercise.

Another problem which could rise within the procedure of association/foundation registration is that of the mandatory permit of the ministry or the central public administration special authority under which jurisdiction is conducted the activity, such imperative demand being reintroduced by the provisions of the art. 5 and 6 of the EOG no. 37/2003.

It is obvious and true, this demand existed also in Law no. 21/1924 (although, at least lawfully, the permit had consultative character), the purpose of the EOG no. 26/2000 being, as we consider, the adjustment of bureaucracy and the waiting time, as it is well known that, in principle, public administration authorities solve the demand within a legal term of 30 days.

We bring this aspect into the reader's attention in order to point out how can be corroborated the terms of registration provided in the EOG no. 26/2000 with the other legal terms. Apparently, the legal procedure starts from the moment of submission of the request and all additional papers, within a three-months terms since the solicitation of name reservation; the problems could appear to the extent to which the authorities of the public administration would delay or not solve the request at all, in which case, practically, the authorized mandate could not accomplish his/her mandate of registering the association/foundation, under the specific penalties.

From another point of view, we consider that in this situation, the provisions with pure administrative character hinder in fact the registration of certain entities which purpose if under no circumstance not-for-profit. From this point of view, the proposals of the Romanian business environment, as well as the international community referring to the simplification of the administrative formalities of registration should be kept in view through analogy. The control post-registration is considered more efficient that the so-called attempt of prevention against certain irregularities in the conducted activity, especially since in the EGO no. 26/2000, art. 14, it is provided the possibility to control certain activities prohibited or limited by law, by obtaining the necessary authorizations, there where considered appropriate, before the commencement of the alleged activity.

Additionally, the penalty endorsed in this article is severe enough, since it refers to the legal dissolution of the respective legal entity.

Another substantial modification brought by the EOG no. 37/2003 is that referring to the public utility recognition of an association/foundation, which problem raised a series of controversies. If initially, the text of the EOG no. 26/2000 established definite criteria of granting this statute (given the possible consequences of the access to public funds), the text of the EOG no. 37/2003 leaves place for the eventual subjective interpretations.

It is quite uncertain the legal definition of “public utility” as “any activity aiming to achieve benefic purposes in domains of general and/or communitarian public interest”, since it is hard to determine the appreciation of the degree of “benefic”.

In the same time, if until March 2003 the terms of granting/rejecting the statute of public utility are relatively short, after the entrance into force of the EOG no. 37/2003, they
cannot be, under any circumstance, shorter than 120 days since the day of submission of the request and the additional documents.

Indeed, such term may be useful for the purpose control for which it solicited the registration as a public utility legal entity, yet the situation should be circumstantiated if it is kept in view that, for example, there are foundations/associations of international level, placed to benefit from certain facilities, but which do not intend to expressly obtain them, but the moral recognition of certain special distinctions in the social life of the country.

It is yet noticed that this quality of public legal entity may be recognized as an ex post facto, for certain structures. For example, the Romanian Fine Arts Union is a public utility legal entity, recognized status, which is right, before the issue of the legal instruments already mentioned; still, the same statute has the Romanian Olympic and Sports Committee, by virtue of the Law no. 69/9.05.2000, so that certain moral prejudices are still possible, by qualifying the statute of public utility legal entity by means of law, with no additional intervention of the executive authority endorsing, after all, the whole society, matter the political inheritance. It is worth noticing that according to the art. 191 NCC, legal entities of public law are constituted by law, which constitution by statute of association is possible only in special circumstances.

In French law, foundations' public utility status is regulated by Law no. 87-571 of the 23th of July 1987, which, for the first time, offered a legal definition to the concept: “A foundation is the deed by which one or several persons decide to assign irrevocably some goods, rights, or resources to the fulfillment of a public interest and not-for-profit purpose.” Since the statute aims to create a legal person, the foundation has no legal authority until the entrance into force of the decree within the National Council qualifying public utility recognition. It acquires then the statute of foundation of public utility.”

The general interest may be philanthropic, educational, scientific, social, family or cultural, and the list can be exhaustive but it should not concern private or personal interests of the founders. The general interest to consider may as well be national or local. The founder of a public utility foundation may be either an individual or a group of individuals, having or not a pre-existent legal entity. Thus, companies (L. n° 87-571, art. 18 2, art. 1) or public institutions of commercial and industrial character (L. of the 4th of July 1990) may create a public utility foundation.

Foundations statutes did not meet, not even at present, a unification at the European provisions level. Thus, the differences of applicable regime are significant enough, starting with the level of interest for which they can constitute – as for example France, Great Britain, Spain and Portugal, where the domestic law imposes their constitution exclusively in the purpose of accomplishing a general interest, while in Romania, Germany or Greece, the authorization of legal persons with non-profit interest is allowed also for the interests of a community or even of a particular interest (such as the insurance of education for the founding members' children). In certain legal systems, such as the Austrian, the Belgian or the Italian, law institutes distinct legal systems depending on the interest ensued – the accomplishment of a general or of a particular interest.

In 2003, the European Commission adopted an action plan endorsing the necessary resolutions for the modernization of the commercial law, within which the problem of the possibility/necessity of unification of the legal system of the foundations and even the creation of a specific European legal framework of regulation of the foundation. Within the launched debate, there was outlined the necessity of unitary regulation of the provisions in matter, the subsidiary application of the domestic law, the authorization of the foundations to exercise commercial activities accessory to the moral interest for which they are
constituted, with the use of the incomes thus obtained during the accomplishment of the objectives. In the same time, there appeared certain reservations regarding the domestic control practices, while prefiguring a special interest for the European foundation's statute, left, until our days, in a project stage.

**Conclusions**

By concluding, both doctrine and legal practice have noticed certain possible issues appeared actually once with the application of the provisions in the legal instruments mentioned above, since they are considered as aspects to be solved by the legislative authority (or the executive authority, given that it is empowered to issue legal instruments with provisory character and submitted to the parliamentary debate, in view of adoption).

Such perspectives could refer punctually to the recognition of the capacity of anticipate use of the associations/foundations, to the more concrete regulation of the legal system of constitution or dissolution of federations, to the correlation of the appeals regarding the alleviation of certain deficiencies of the memoranda of association with trial terms referring to the procedure of summoning of common law or to the express delegation to specialized authorities of coordination and effective control of the conducted activities aiming to accomplish the purpose of the foundation/association.

**References**


[4]. European Foundation Center, Comparative Highlights of Foundation Law, 2007